No. 94-1827

Supreme Court, U.S.
FILED
JUL 5 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

JOHN O. ZIPPERER, JR., an individual,

Petitioner,

vs.

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF TO THE CITY OF FORT MYERS' AND LEE COUNTY'S BRIEFS IN OPPOSITION TO JOHN O. ZIPPERER JR.'S PETITION FOR A WRIT OF CERTIORARI

*John H. Rains, III
William P. Gray, III
Annis, Mitchell, Cockey, Edwards & Roehn, P.A.
Post Office Box 3433
Tampa, Florida 33601
(813) 229-3321
Attorneys for Petitioner

(**Counsel of Record*)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

4899

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fourteenth Amendment requires a public body to give prior actual written notice to the owner of a prior-recorded first mortgage lien, whose address is easily ascertainable from the public records, of special assessment hearings which create enormous "super-priority" special assessment liens that immediately and drastically diminish the value of the prior-recorded first mortgage lien by subordinating the first mortgage lien to the super-priority special assessment liens?

2. Does the decision of the court of appeals below, which holds that an owner of a prior-recorded Florida first mortgage lien is not entitled to prior actual notice of the subordination of his first lien to millions of dollars of super-priority special assessment liens, conflict with this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), which holds that a super-priority lien arising from a tax sale does immediately and drastically diminish the value of a prior-recorded mortgage lien?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

JOHN O. ZIPPERER, JR.

Respondents:

The City of Fort Myers, a chartered municipality and political subdivision of the State of Florida; Fort Myers City Council, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Fort Myers City Council, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; Fort Myers City Council, as the Governing Authority of Improvement District No. 17; Improvement District No. 10, Northeast Colonial Sewer and Water District; Improvement District No. 15, Omni Interstate Park; Improvement District No. 17; Lee County, a political subdivision of the State of Florida; Colonial Road Extension Improvement Special District Board, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; Colonial Road Extension Improvement Special District.[1]

---

[1] Although not a named party, the State of Florida filed amicus curiae briefs in support of the Respondents' position in both the Court of Appeals and District Court below and has been served with this Petition.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Page

CASES CITED:

Connecticut v. Doehr, 501 U.S. 1 (1991) 6

Federal Deposit Insurance Corporation v. City of New Iberia, 921 F. 2d 610 (5th Cir. 1991) 6, 7

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) 6, 8

Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306 (1950) 10

Sarasota County v. Andrews, 573 So.2d 113 (Fla. Dist. Ct. App. 2d Dist. 1991) 7, 8

Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988) 6

Utley v. City of St. Petersburg, 292 U.S. 106 (1934) 7, 9, 10

Wagner v. Leser, 239 U.S. 207 (1915) 8, 9, 10

Withnell v. Ruecking, 249 U.S. 63 (1919) 9, 10

Zipperer v. City of Fort Myers, 41 F.3d 619 (11th Cir. 1995) 5, 6, 7

STATUTES CITED:

UNITED STATES CODE:

28 U.S.C. § 1983 3

FLORIDA STATUTES:

Florida Statutes, Chapter 170 (1993) 2

Florida Statutes, Section 170.07 (1993) 3

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION:

Amendment XIV.....2, 3

FLORIDA CONSTITUTION:

Article X, § VI 2

APPENDIX

APPENDIX A – Amended Complaint And Demand For Jury Trial Of John O. Zipperer, Jr A1

No. 94-1827

In The

Supreme Court of the United States

October Term, 1995

JOHN O. ZIPPERER, JR., an individual,

Petitioner,

vs.

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF TO THE CITY OF FORT MYERS' AND LEE COUNTY'S BRIEFS IN OPPOSITION TO JOHN O. ZIPPERER JR.'S PETITION FOR A WRIT OF CERTIORARI

Petitioner, John O. Zipperer, Jr., respectfully files this reply brief in support of his Petition for a Writ of

Certiorari and in response to the City of Fort Myers' and Lee County's Briefs in Opposition to Mr. Zipperer's Petition.

STATEMENT OF THE CASE

Mr. Zipperer disagrees with numerous of Lee County's and the City of Fort Myers' factual assertions which are stated in their briefs in opposition to Mr. Zipperer's Petition for Certiorari. On page 1 of its Brief in Opposition, Lee County states that Mr. Zipperer has conceded that the special assessment districts and the adoption and imposition of the special assessments were lawfully enacted and followed the applicable requirements of state statutes. Even a brief perusal of Mr. Zipperer's Amended Complaint and Demand for Jury Trial, which is printed as Appendix A to this reply brief, reveals that this statement is incorrect.

For instance, Counts I and II of Mr. Zipperer's amended complaint (App. A) allege that the City and County entities' failure to provide Mr. Zipperer with actual written notice of the special assessment hearings violated the Fourteenth Amendment to the United States Constitution and Article X, Section VI, of the Florida Constitution, was founded on an "improper motive" and was done through "arbitrary or pretextual means and had no rational basis." (App. A, paragraphs 41, 42, 44, 51, 52, 54). Additionally, Counts I and II of Mr. Zipperer's amended complaint also allege that the City and County entities' actions subordinating Mr. Zipperer's first mortgage lien amounted to an "illegal impairment of his contract rights" and violated Chapter 170, *Florida Statutes*,

because they "were not for a public purpose" and "did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed." (App. A, paragraphs 43, 47, 53, 57).

Furthermore, Count III and Count IV of Mr. Zipperer's amended complaint (App. A) challenge the City and County entities' failure to give Mr. Zipperer actual notice of the special assessment hearings as an unlawful act committed under color of State law in violation of 28 U.S.C. § 1983. Counts V and VI of Mr. Zipperer's amended complaint challenge the actions of the City and County entities as an illegal taking of Mr. Zipperer's property interest in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section VI, of the Florida Constitution. In the face of such allegations, Lee County's claim that Mr. Zipperer has conceded that these assessments were lawfully enacted is ludicrous.

Lee County also asserts that Mr. Zipperer has never challenged the legality of the state statutes involved. Even the City of Fort Myers recognizes the fallacy of this statement. On page 6 of its Brief in Opposition to Mr. Zipperer's Petition for Certiorari, the City of Fort Myers notes that Mr. Zipperer's complaint "asserts that his Fourteenth Amendment due process rights were violated by Florida law itself." Mr. Zipperer *has* challenged the legality of the notice provision of *Florida Statutes*, Chapter 170, (Section 170.07) because that notice provision does not provide for actual written notice to mortgagees such as Mr. Zipperer.

Lee County further claims that Mr. Zipperer never raised an objection in the "proceedings below" based on

the lack of benefit contributed by the special assessment improvements. Once again, even a brief perusal of the amended complaint belies Lee County's assertion. In numerous places in the amended complaint, Mr. Zipperer alleges that the assessment "improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed." (App. A, paragraphs 47, 57, 67, 78). Furthermore, Lee County's assertion that Mr. Zipperer never claimed that the assessments were confiscatory (Lee County Brief in Opposition, p. 2) is incomprehensible in light of Counts VI and VII of the amended complaint, which are causes of action alleging that the assessments on the Mortgaged Property "constitute an illegal taking of Mr. Zipperer's property." (App. A, paragraphs 82, 88).

Additionally, the City of Fort Myers also has made several misstatements of Mr. Zipperer's position in its Brief in Opposition to Mr. Zipperer's Petition for Certiorari. The City, on page 4 of its Brief in Opposition, asserts that Mr. Zipperer has conceded that the assessment procedures required by Florida law were followed. Mr. Zipperer, however, has never conceded this fact. Mr. Zipperer, in fact, has contended the United States Constitution *and* the Florida Constitution, *Florida Statutes* and Florida case law all have been violated by the City and County entities' actions in passing these special assessments. (*See* the discussions and amended complaint citations above and Counts VII and VIII of Mr. Zipperer's amended complaint [App. A], alleging breach of a common law duty, and Count IX of Mr. Zipperer's amended complaint, a cause of action against the City entities for illegal use of assessment funds.)

Finally, on page 7 of the City's Brief in Opposition to Mr. Zipperer's Petition, the City asserts that Mr. Zipperer has conceded that he retains a plain, speedy and efficient remedy to assert his objections to these assessments in State Court. In fact, Mr. Zipperer has never conceded this point and, in its opinion below, the Eleventh Circuit Court of Appeals specifically found that Mr. Zipperer had no such plain, speedy and efficient remedy. *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) (*See* App. A, p. A7, of Mr. Zipperer's Petition for a Writ of Certiorari). (*See, also*, Mr. Zipperer's Brief in Opposition to the City of Fort Myers Cross-Petition for Certiorari on the Tax Injunction Act which has been filed simultaneously with this Reply Brief.)

ARGUMENT

In addition to the numerous factual errors in the City's and County's statements of Mr. Zipperer's position, Lee County and the City of Fort Myers attempt to justify their actions by characterizing Mr. Zipperer as an "improvident" investor (Lee County's Brief in Opposition, p. 5). It is, however, Lee County and the City of Fort Myers which are the actual improvident investors. Lee County and the City of Fort Myers assisted *a private developer* in gaining cheap construction financing (which a private lender probably would not have provided) for a development which was never built. They now seek to recoup some of their losses from Mr. Zipperer, an innocent lienholder who was not given written notice and an opportunity to object to the improvident activities of Lee County and the City of Fort Myers.

The primary case relied upon by both Lee County and the City of Fort Myers in their briefs in opposition to Mr. Zipperer's Petition for a Writ of Certiorari is *Federal Deposit Insurance Corporation v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991), which also is the case the Eleventh Circuit cited to support its opinion below. *See Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995). The *New Iberia* decision is fundamentally flawed for the same reasons that the Eleventh Circuit *Zipperer* decision is flawed and the arguments presented in Mr. Zipperer's Petition for a Writ of Certiorari also apply to distinguish the *New Iberia* decision. Briefly, the *New Iberia* court incorrectly held that, under *Louisiana law*, the imposition of a super-priority lien did not constitutionally impair a prior-recorded mortgagee's property right in the mortgagee's mortgage lien. The *New Iberia* court, like the *Zipperer* court, was of the opinion that the injury suffered by a mortgagee was not severe enough to warrant the constitutional protection provided by the due process clause. As Mr. Zipperer pointed out in his Petition for a Writ of Certiorari, that opinion is contrary to this Court's holdings in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798; *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 488 (1988); and *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). Simply put, this Court *has* repeatedly held that governmental action does *not* have to totally extinguish a mortgagee's property right to trigger the protections of the due process clause.

Additionally, the *Florida* court with jurisdiction over the mortgaged lands and property in this case already has held that a super-priority provision in an ordinance *does* substantially and immediately impair the value of a

pre-existing mortgage lien such as Mr. Zipperer's. *Sarasota County v. Andrews*, 573 So.2d 113, 115 (Fla. Dist. Ct. App. 2d Dist. 1991). Furthermore, both the *New Iberia* and *Zipperer* courts overlooked the essential point that it is the *risk of deprivation*, and not a post-hoc rationalization of whether or not a deprivation actually occurred, which determines whether or not the due process clause applies.

Additionally, the other case law cited by the City does not support its position. The City's citation to *Utley v. City of St. Petersburg*, 292 U.S. 106 (1934) is misplaced because *Utley* involved a challenge to a special assessment brought by the landowners themselves and did not involve a challenge by a competing lienholder such as Mr. Zipperer. While the "improvements" imposed by a special assessment may benefit the landowner (provided that the value of the improvements at least equals the amount assessed) those "improvements" do not benefit a mortgagee. In fact, they immediately and substantially impair the value of the mortgagee's prior-recorded first mortgage lien. This fundamental difference between the effect the imposition of a super-priority special assessment lien has upon the respective property interests of a landowner and a mortgagee was overlooked by both the *New Iberia* court and the Eleventh Circuit panel which rendered the *Zipperer* opinion.

The City of Fort Myers attempts to gloss over this distinction by arguing that Mr. Zipperer's right to foreclose upon the mortgage is unaffected by the imposition of the super-priority special assessment liens. The City's assertion is untrue. Prior to the imposition of the super-priority special assessment lien, Mr. Zipperer was a *first* lienholder with a right to foreclose all other subsequent lienholders. After the imposition of the super-priority

special assessment liens, Mr. Zipperer no longer has the right to foreclose the subsequent special assessment liens imposed by the City of Fort Myers and Lee County. Furthermore, the value of Mr. Zipperer's mortgage as an instrument that can be bought and sold on the secondary market has been immediately and drastically reduced by the subordination of the prior-recorded first mortgage to a second lien status. *See Sarasota County v. Andrews*, 573 So.2d 113, 115 (Fla. Dist. Ct. App. 2d Dist. 1991).

Once again, the City has asserted that Mr. Zipperer may not challenge these assessments because, as a mortgagee, his interest in the property is derivative from that of the owner. This strange use of agency theory, to somehow bind the mortgagee through the actions of a mortgagor, simply is improper and inapplicable to the present situation. In fact, Mr. Zipperer's Mortgage prohibited any waste or impairment of the property by the Mortgagor. As the *Mennonite* court noted, the mortgagor's interests are not identical or aligned with the mortgagee's and notice to the mortgagor is not constitutionally sufficient notice to the mortgagee. *Mennonite*, 462 U.S. at 799.

The City's citation to *Wagner v. Leser*, 239 U.S. 207 (1915) is unpersuasive for three reasons. First, the *Wagner* court placed great emphasis upon the fact that it was the State of Maryland's Legislature and not the local city government which imposed the special assessment. In this context, the court stated:

> Taking the decisions in this Court together, we think that it results that the *legislature* of a state may determine the amount to be assessed for a given improvement, and designate the lands and property benefitted thereby, upon which the assessment is to be made, without first giving an

> opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.
>
> *Id.* at 219.

In the present case, the Florida Legislature made no such determination of the amount to be assessed or the property to be benefitted by those alleged improvements.

Second, the *Wagner* court noted that there was no allegation or proof of a disproportion between the assessment made and the benefit conferred "as to suggest that the small tax levied upon this property would amount to an arbitrary exercise of the legislative power upon the subject." *Id.* at 220. In the present case, Mr. Zipperer has alleged that the alleged benefit conferred was vastly disproportionate to the amounts assessed.

Third, unlike the present case, the *Wagner* decision nowhere mentions the issue of whether or not the imposition of a *super-priority lien* amounts to an immediate and substantial diminishment of a *mortgagee's* property interest. Like *Utley*, *Wagner* exclusively confines itself to the issue of whether or not the imposition of a special assessment confers a benefit upon the land itself. Neither *Wagner* nor *Utley* confront the question of whether or not the imposition of a super-priority special assessment lien confers a benefit upon a first mortgage lien which is the question presented by the present case.

The City's citation of *Withnell v. Ruecking Construction Co.*, 249 U.S. 63 (1919) is also unpersuasive, as *Withnell* once again involved a landowner's and *not* a mortgagee's challenge to the special assessments. Additionally, the landowner in *Withnell* was not entitled to a hearing

because both the method *and the amount of the special assessment* were determined by legislative act (the Charter of the City of St. Louis). In the present case, the amount of the assessment was not controlled and determined by any legislative act.

Furthermore, the City's citation of these cases is, in essence, an attempt to beg the actual question of whether or not *mortgagees* are required to receive written notice of a special assessment hearing when the hearing itself is already provided for by statute. In the above three cases, the question was not who was required to receive notice but, rather, whether or not a hearing was required at all! Finally *Wagner, Withnell* and *Utley* were all decided in the pre-*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) era when due process protections were not as strong as they are today.

CONCLUSION

For the foregoing reasons, Mr. Zipperer respectfully requests that this court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

JOHN H. RAINS, III FBN 280283
WILLIAM P. GRAY, III FBN 983993
ANNIS, MITCHELL, COCKEY,
EDWARDS & ROEHN, P.A.
Post Office Box 3433
Tampa, Florida 33601
Attorneys for Petitioner
(813) 229-3321
(813) 223-9067 (FAX)
*(*Counsel of Record)*

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

JOHN O. ZIPPERER, JR., an individual,

Plaintiff,

vs.

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the

Case No. 93-108-CIV-FTM-23D

FBN 280283

Governing Authority of the Dependant Special District known as Colonial Road Extension Improvement Special District; and COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Defendants.
_____/

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, JOHN O. ZIPPERER, JR. ("Mr. Zipperer"), sues Defendants, THE CITY OF FORT MYERS ("City"), a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District ("District 10 Governing Authority"); FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park ("District 15 Governing Authority"); FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17 ("District 17 Governing Authority"); IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT ("District 10"); IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK ("District 15"); IMPROVEMENT DISTRICT NO. 17 ("District 17"); LEE COUNTY ("County"), a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependant Special District known as Colonial Road Extension

Improvement Special District ("Board"), and COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT ("Special District"), and alleges:

GENERAL ALLEGATIONS

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 as a federal question action.

2. Plaintiff is a citizen of the State of Florida and a resident of Lee County, Florida.

3. City is a chartered municipality pursuant to Chapter 165, Florida Statutes, and a political subdivision of the State of Florida.

4. District 10 Governing Authority is the governing authority of District 10 pursuant to Chapter 170, Florida Statutes and Resolution No. 86-48 of the Fort Myers City Council, Florida ("City Council").

5. District 15 Governing Authority is the governing authority of District 15 pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 88-56.

6. District 15 Governing Authority is the governing authority of District 17, pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-64.

7. District 10 is an improvement district pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-48.

8. District 15 is an improvement district pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-48.

9. District 17 is an improvement district pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-48.

10. County is a non-chartered political subdivision of the State of Florida.

11. Board is the governing authority of the Special District pursuant to Section 125.01, Chapter 170 and Chapter 189, Florida Statutes, and Lee County Ordinance No. 90-08.

12. Special District is a Dependant Special District pursuant to Section 125.01 and Chapter 189, Florida Statutes and Lee County Ordinance No. 90-08.

13. All conditions precedent to the relief requested herein have been performed, have occurred or have otherwise been waived.

14. Mr. Zipperer demands a jury trial on all issues.

FACTS

15. On August 14, 1986, P. Gerald DeSimone, Trustee ("DeSimone"), executed and delivered to Mr. Zipperer a Promissory Note in the principal amount of Eight Million Nine Hundred Thousand and No/100 Dollars ($8,900,000.00) which called for three (3) annual payments of interest only and thereafter for six (6) annual payments of principal and interest in the amount of One Million Five Hundred Eleven Thousand Two Hundred Twenty and No/100 Dollars ($1,511,220.00) with the remaining outstanding principal and all accrued interest to be due and payable on maturity on August 14, 1996. A true and correct copy of the Promissory Note is attached

to the original Complaint and incorporated herein as Exhibit 1.

16. On August 14, 1986, in order to secure the Promissory Note referred to above, DeSimone executed and delivered to Mr. Zipperer a Mortgage Deed which was recorded on August 14, 1986 in Official Record Book 1862, Pages 4282-4286, of the Public Records of Lee County, Florida and by which DeSimone granted to Mr. Zipperer a security interest in and to the real property described in the Mortgage Deed together with all oil, gas and mineral rights (the "Mortgaged Property"). In the Mortgage Deed, DeSimone warranted that the Mortgaged Property was free from all encumbrances. The mortgage had no provision providing for any subordination of Mr. Zipperer's mortgage to any subsequent development or construction financing and, indeed, Mr. Zipperer specifically objected to any such provision when the mortgage terms were negotiated. In addition, the Mortgage Deed which was recorded and thus giving constructive notice to anyone attempting to impose a subsequent lien on the property, contains a provision expressly prohibiting "waste, *impairment* or deterioration of said property or any part thereof." A true and correct copy of the Mortgage Deed is attached to the original Complaint and incorporated herein as Exhibit 2.

17. On November 18, 1986, Mr. Zipperer and DeSimone entered into a Mortgage Modification Agreement which was recorded on December 9, 1986, in official Record Book 1884, Pages 1456-1457, of the Public Records of Lee County, Florida and which modified the terms of the Mortgage Deed to include as security for the Promissory Note all oil and mineral rights to the real property

described in Exhibit 3, attached to the original Complaint and incorporated herein by reference. A true and correct copy of the November 18, 1986 Mortgage Modification Agreement is attached to the original Complaint and incorporated herein as Exhibit 4.

18. On October 26, 1990, Mr. Zipperer and DeSimone entered into a Mortgage Modification Agreement which was recorded on November 8, 1990, in Official Record Book 2185, Pages 4652-4654, of the Public Records of Lee County, Florida and which modified the terms of the Mortgage Deed to provide for a payment of unpaid interest and accrued interest thereon to be due and payable on December 1, 1990 and thereafter for annual payments of principal and interest commencing on August 14, 1992 with all remaining outstanding principal and accrued interest thereon to be due and payable at maturity on August 14, 1996. A true and correct copy of the October 26, 1990 Mortgage Modification Agreement is attached to the original Complaint and incorporated herein as Exhibit 5.

19. Mr. Zipperer owns and holds the Mortgage Deed, Promissory Note, November 18, 1986 Mortgage Modification Agreement and the October 26, 1990 Mortgage Modification Agreement. Under Florida law, the subordination of a preexisting mortgage from a first to a second lien position is recognized as an immediate impairment. Any subordination automatically puts the preexisting mortgagee at a substantially greater risk of losing its investment if it has a second, as opposed to a first, priority lien without even considering the value of the underlying property.

20. The Mortgaged Property is made up of Parcel Nos. 27-44-25-OC-08606.0000 ("8606"), 26-44-25-OC-08602.0000 ("8602"), and 22-44-25-OC-08601.0000 ("8601").

21. Pursuant to City Council Resolution No. 88-28, as amended by City Council Resolution No. 90-46, a Development Order was issued for Omni Interstate Park, which includes the Mortgaged Property.

DISTRICT 10

22. On September 22, 1986, City Council entered Resolution No. 86-48 which created District 10 in the City of Fort Myers, Florida and in Lee County, Florida. District 10, which included the Mortgaged Property, was created pursuant to Chapter 170, Florida Statutes, "for the construction of local sanitary sewage transmission mains, lift stations, water transmission mains, and other appurtenant facilities." The estimated cost of construction in District 10 was $13,000,000.00 with $10,000,000.00 to be borne by the properties in District 10, including the Mortgaged Property. A true and correct copy of Resolution No. 86-48 is attached to the original Complaint and incorporated herein as Exhibit 6.

23. Through Resolution No. 88-5 of February 16, 1988, the District 10 Governing Authority adopted the assessment roll for District 10. Resolution No. 88-5 contemplated that property owners and "other persons interested" in the property (presumably other directly affected persons, such as mortgagees) could appear before the District 10 Governing Authority to be heard as to the

propriety and advisability of the improvements to District 10, the assessments and the method of assessment. However, Resolution No. 88-5 only directed that property owners receive written notice of the meeting to be held to discuss these issues. Nowhere did Resolution No. 88-5 provide for written notice to mortgagees or any other interested parties, though mortgagees could have been easily identified through the public records. In fact, the City Clerk or consulting engineer did review the public records to locate the names of the property owners to receive the written notice. Given that fact, deriving from those same public records the identity of prior recorded mortgages and providing written notice to those mortgagees that special assessment that would subordinate their lien mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $377,000.00 out of the $10,000,000.00 went directly to the City for "administration," this "burden" is not unreasonable. The assessment roll attached to Resolution No. 88-5 included Parcel Nos. 8601 and 8602, but did not include Parcel No. 8606. A true and correct copy of Resolution No. 88-5 is attached hereto and incorporated herein as Exhibit 7.

24. Through Resolution No. 88-8 of March 7, 1988, the District 10 Governing Authority levied certain special assessments on the properties on the District 10 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the

assessments as legal, valid and binding first liens, coequal with the lien of other taxes and superior to all other liens, titles and claims, until paid. Resolution No. 88-8 directed the City Clerk to record the assessments. Resolution No. 88-8 was recorded in Official Record Book 2002, Pages 2419-2430 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 88-8 is attached to the original Complaint and incorporated herein as Exhibit 8.

25. Through Resolution No. 89-70 of November 6, 1989, the District 10 Governing Authority authorized the City Clerk to file a lien on the District 10 properties, including the Mortgaged Property for the unpaid pro rata cost of improvements made in District 10. Resolution No. 89-70 included Parcel Nos. 8801, 8802 and 8806. Resolution No. 89-70 was recorded in Official Record Book 2109, Pages 3829-3838 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 89-70 is attached to the original Complaint and incorporated herein as Exhibit 9.

26. Although the actual improvements for Phase I of the District 10 improvements were only $8,235,757.00, through Resolution No. 89-70, the District 10 Governing Authority authorized the liening of the District 10 properties, including the Mortgaged Property, for a pro rata cost per acre for $10,000,000, that is, the full amount of the estimated cost of improvements to be borne by the District 10 properties.

27. Although Mr. Zipperer was a prior mortgage holder through the Mortgage Deed which is Exhibit 2, Mr. Zipperer was not given actual written notice of the

proposed District 10 assessments, nor any of the other proposed Districts described below, explaining that the assessments would become a "first lien" over his first mortgage.

DISTRICT 15.

28. On October 17, 1988, City Council entered Resolution No. 88-56 which created District 15 in the City of Fort Myers, Florida. District 15, which included the Mortgaged Property, was created pursuant to Chapter 170, Florida Statutes, "for the construction of a water distribution system, wastewater collection system, paving improvements, including the construction of Omni Boulevard, S.E. entrance and Cypress Loop Road and other appurtenant facilities." The estimated cost of construction in District 15 was $10,900,000.00. A true and correct copy of Resolution No. 88-56 is attached to the original Complaint and incorporated herein as Exhibit 10.

29. Through Resolution No. 89-26 of April 17, 1989, the District 15 Governing Authority adopted the assessment roll for improvements to District 15. Resolution No. 89-26 contemplated that owners of the property and "other persons interested" (presumably other directly affected persons, such as mortgagees) in the property could appear before the District 15 Governing Authority to be heard as to the propriety and advisability of the improvements to District 15, the assessments, and the method of assessment. However, Resolution No. 89-26 only directed that property owners receive written notice of the meeting to be held to discuss these issues. *Nowhere* did Resolution No. 89-26 provide for written notice to

mortgagees or any other interested parties, though mortgagees could have been easily identified through the public records. The City Clerk or consulting engineers in fact did review the public records to locate the names of the property owners to receive the written notice. Given that fact, searching those same public records to determine the indentity [sic] of prior recorded mortgages and providing written notice to those mortgagees that a special assessment would subordinate their mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $282,600.00 out of the $10,900,000.00 went directly to the City for "Administration," this "burden" is not unreasonable. The assessment roll included Parcels No. 8606, 8602, and 8601. A true and correct copy of Resolution No. 89-26 is attached to the original Complaint and incorporated herein as Exhibit 11.

30. Through Resolution No. 89-32 of May 15, 1989, the District 15 Governing Authority levied certain special assessments on the properties on the District 15 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the assessments as legal, valid and binding first liens, coequal with liens of other taxes and superior to all of the liens, titles, and claims, until paid. Resolution No. 89-32 directed the City Clerk to record the assessments. Resolution No. 89-32 was recorded in official Record Book 2072, Pages 3091-3094 of the Public Records of Lee County,

Florida. These special assessments, as recorded in Resolution No. 89-32, have been imposed as a lien on the property. A true and correct copy of Resolution No. 89-32 is attached to the original Complaint and incorporated herein as Exhibit 12.

DISTRICT 17

31. On November 21, 1988, City Council entered Resolution No. 88-64 which created District 17 in the City of Fort Myers, Florida. District 17, which included the Mortgaged Property, was created pursuant to Chapter 170, Florida Statutes, for the design and installation of roadways and other appurtenant facilities. The estimated cost of construction in District 17 was $6,017,000.00. A true and correct copy of Resolution No. 88-64 is attached hereto and incorporated to the original Complaint as Exhibit 13.

32. Through Resolution No. 89-25 of April 17, 1989, the District 17 Governing Authority adopted the assessment roll for the improvements to District 17. Resolution No. 89-25 contemplated that owners of the property and "other persons interested" (presumably other directly affected persons, such as mortgagees) in the property could appear before the City Council to be heard as to the propriety and advisability of the improvements to District 17, the assessments, and the method of assessment. However, Resolution No. 89-25 only directed that property owners receive written notice of the meeting to discuss these issues. *Nowhere* did Resolution No. 89-25 provide for written notice to mortgagees or any other interested parties, although mortgagees could have been

easily identified through the public records. The City Clerk or consulting engineers in fact did review the public records to locate the names of the property owners to receive the written notice. Given that fact, searching those same public records to determine the identity of prior recorded mortgages and providing written notice to those mortgagees that a special assessment would subordinate their mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $260,000.00 out of the $6,017,000.00 went directly to the City for Administration, this "burden" is not unreasonable. The assessment roll included Parcel Nos. 8606, 8602, and 8601. A true and correct copy of Resolution No. 89-25 is attached to the original Complaint and incorporated herein as Exhibit 14.

33. Through Resolution No. 89-33 of May 15, 1989, the District 17 Governing Authority levied certain special assessments on the properties on the District 17 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the assessments as legal, valid, and binding first liens, coequal with liens of other taxes and superior to all other liens, titles, and claims, until paid. Resolution No. 89-33 directed the City Clerk to record the assessments. Resolution No. 89-33 was recorded in Official Record Book 2072, Pages 3095-3099 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 89-33

is attached to the original Complaint and incorporated herein as Exhibit 15.

SPECIAL DISTRICT

34. On October 11, 1989, DeSimone entered into an Agreement with the City and County to levy special assessments on the Mortgaged Property. A true and correct copy of the Agreement is attached to the original Complaint and incorporated herein as Exhibit 16.

35. On February 21, 1990, the Lee County Board of County Commissioners passed Ordinance No. 90-08 which created the Special District, pursuant to Section 125.01 and Chapter 189, Florida Statutes, included the Mortgaged Property, for road improvements in Lee County and the City of Fort Myers, Florida. Through Ordinance No. 90-08, the Board levied special assessments to finance the improvements. A true and correct copy of Ordinance No. 90-08. is attached to the original Complaint and incorporated herein as Exhibit 17.

36. On October 24, 1990, the Board entered Resolution No. 1 which ratified the substantial completion of the acquisition and construction of the Special District improvements. Resolution No. 1 indicated that notice had been given to the property owners of the hearing to discuss these improvements and the assessments. However, Resolution No. 1 made no mention of notice to mortgagees or any other interested parties, although mortgagees could have been easily identified through the public records. Presumably, someone at the County or at the County's direction reviewed the public records to locate the names of the property owners to receive the

written notice. In the process of conducting a title search to determine ownership, it would be an easy matter to also search for prior recorded mortgages. Providing such notice that a special assessment that would subordinate the mortgage was under consideration would be a "minor" burden and would only involve some slight additional title work, typing a letter and envelope and a stamp. The County contemplated that property owners and those interested in the property could attend the hearing, however, notice was only given to the owners. Resolution No. 1 provides that the special assessments would constitute a lien upon the property, a first lien superior in dignity to all other liens, titles, and claims, until paid. The amount assessed on the Omni Interstate Park property, which includes the Mortgaged Property, as part of the Special District was $1,000,000.00. A true and correct copy of Resolution No. 1 is attached to the original Complaint and incorporated herein as Exhibit 18.

37. On September 21, 1990, DeSimone entered into a Supplemental Agreement with the City and County to levy special assessments on the Mortgaged Property. A true and correct copy of the Supplemental Agreement is attached to the original Complaint and incorporated herein as Exhibit 19.

38. Through Resolution No. 2 of October 24, 1990, the Board adopted the assessments and imposed them on the properties in the Special District, including the Mortgaged Property. A true and correct copy of Resolution No. 2 is attached to the original Complaint and incorporated herein as Exhibit 20.

39. Through Resolution No. 3 of September 23, 1991, the Board "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the Agreement and Supplemental Agreement and the assessments and levied the assessments on the Special District Property, including the Mortgaged Property. Resolution No. 3 was recorded in official Record Book 2299, Pages 426-446 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 3 is attached to the original Complaint and incorporated herein as Exhibit 21.

COUNT I

Cause of Action Against City, District 10 Governing Authority, District 15 Governing Authority, District 17 Governing Authority, District 10, District 15 and District 17:
Denial of Mr. Zipperer's Right to Due Process

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

40. The City, District 10 Governing Authority, District 15 Governing Authority, District 17 Governing Authority, District 10, District 15 and District 17 (hereinafter collectively "City Entities") failed to provide Mr. Zipperer with notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

41. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida

Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

42. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property. Mr. Zipperer was also entitled to notice that the special assessment would become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County and expressly prohibited any impairment. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

43. The Resolutions which the City Entities passed to levy special assessments on the District 10, 15 and 17 properties, including the Mortgaged Property, were adopted pursuant to including the provisions of Chapter 170, Florida Statutes. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be assessed. Section 170.07, Florida Statutes, provides that the governing authority, in

this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, Florida Statutes also provides that ten (10) days written notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

44. The City Entities never provided Mr. Zipperer, a holder of a mortgage and security interest in the Mortgaged Property which was part of the property affected by the Resolutions, with actual written notice that the City Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessment would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property. The City Entities' failure to notify Mr. Zipperer was founded on an improper motive, particularly given the ease with which the City Entities could have of [sic] provided notice to lien holders, with a desire to protect only their interests at the expense and in wilful disregard of the rights of innocent lien holders. In addition, the City Entities failure to notify Mr. Zipperer was done through arbitrary or pretextual means and had no rational basis.

45. The City Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Districts 10, 15, and 17. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to

join in such things as a plat which is recorded after the mortgage. See Section 177.081, Florida Statutes.

46. Mr. Zipperer was entitled to written notice reasonably calculated under all the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Districts 10, 15, and 17, to notice of the proposed special assessments and their nature.

47. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status behind the District 10, 15 and 17 special assessment liens and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has no frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

48. Because the City Entities failed to provide the requisite written notice reasonably calculated under the circumstances to apprise Mr. Zipperer of the pendency of an action which materially affected his security interest in

the Mortgaged Property, the liens attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Districts 10, 15, and 17 should be subordinated as junior liens to Mr. Zipperer's purchase money mortgage and foreclosed.

49. The City Entities denied Mr. Zipperer his right to due process, as provided under the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritization of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the cost of this action, and other such relief as the Court deems just, necessary, and proper.

COUNT II

Cause of Action Against County,
Board and Special District:
Denial of Mr. Zipperer's Right to Due Process

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

50. County, Board and Special District (hereinafter collectively "County Entities") failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

51. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida

Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

52. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property. Mr. Zipperer was also entitled to written notice that the special assessment would become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

53. The Ordinance and Resolutions which the Board passed to levy special assessments on the special District properties, including the Mortgaged Property, were adopted pursuant to the provisions of Section 125.01 Chapter 170 and Chapter 189, Florida Statutes. Section 125.01, Florida Statutes provides supplemental and alternative methods for making local improvements. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be

assessed. Section 170.07, Florida Statutes, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, Florida Statutes also provides that ten (10) days' notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

54. The County Entities never provided Mr. Zipperer, a holder of a mortgage and security interest in the Mortgaged Property which was part of the property affected by the Ordinance and Resolutions, with actual written notice that the County Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessment would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property. The County Entities' failure to notify Mr. Zipperer was founded on an improper motive, particularly given the ease with which the County Entities could have provided written notice to lien holders, with a desire to protect only their interests at the expense and in wilful disregard of the rights of innocent lien holders. In addition, the County Entities failure to notify Mr. Zipperer was done through arbitrary or pretextual means and had no rational basis.

55. The County Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Special District. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat which is recorded after the mortgage. See Section 177.081, Florida Statutes.

56. Mr. Zipperer was entitled to written notice reasonably calculated under all the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Special District, to notice of the Special District special assessments and their nature.

57. As a direct and proximate result of the County Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the Special District special assessment lien, and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

58. Because the county Entities failed to provide the requisite written notice reasonably calculated under the circumstances to apprise Mr. Zipperer of the pendency of an action which materially affected his security interest in the Mortgaged Property, the lien attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Special District should be subordinated as a junior lien to Mr. Zipperer's purchase money mortgage and foreclosed.

59. The County Entities denied Mr. Zipperer his right to due process as provided under the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the Special District special assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary, and proper.

COUNT III

Cause of Action Against City Entities: § 1983 Action

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

60. The City Entities acting under color of state law failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

61. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

62. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property, special assessments would become a lien superior to Mr. Zipperer's security interest in the Mortgaged property and that would become superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

63. The Resolutions which the City Entities passed to levy special assessments on the District 10, 15 and 17 properties, including the Mortgaged Property, were adopted pursuant to the provisions of Chapter 170, Florida Statutes. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the

land to be assessed. Section 170.07, Florida Statutes, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed or any other interested persons may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, Florida Statutes also provides that ten (10) days' notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

64. Under color of state law, the City Entities never provided Mr. Zipperer who held a mortgage and security interest in the Mortgaged Property, which was a part of the property affected by the Resolutions, with actual written notice that the City Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessments would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property.

65. The City Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Districts 10, 15, and 17. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat which is recorded after the mortgage. See Section 177.081, Florida Statutes.

66. Mr. Zipperer was entitled to written notice reasonably calculated under the circumstances to apprise

him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property which was included in Districts 10, 15, and 17 to notice of the proposed special assessments and their nature.

67. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first Purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the District 10, 15 and 17 special assessment liens and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

68. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer was required to retain the undersigned attorneys and is required to pay a reasonable fee for their services. Mr. Zipperer is entitled to a reasonable attorneys' fee as part of the cost pursuant to Title 42 U.S.C.A Section 1988.

69. Because the City Entities failed to provide the requisite written notice reasonably calculated to apprise

Mr. Zipperer under the circumstances of the pendency of an action which materially affected his security interest in the Mortgaged Property, the liens attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Districts 10, 15, and 17 should be subordinated as junior liens to Mr. Zipperer's purchase money mortgage and foreclosed.

70. The City Entities acting under color of state law denied Mr. Zipperer his right to due process.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment liens, compensatory damages, attorneys' fees, the costs of this action, and other such relief as the Court deems just, necessary, and proper.

COUNT IV

Cause of Action Against the County Entities: § 1983 Action

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

71. The County Entities acting under color of state law failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interes: in the Mortgaged Property.

72. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida

Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

73. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property and that the special assessments would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property and that would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

74. The Ordinance and Resolutions which the Board passed to levy special assessments on the Special District properties, including the Mortgaged Property, were adopted pursuant to the provisions of Section 125.01 Chapter 170 and Chapter 189, Florida Statutes. Section 125.01, Florida Statutes provides supplemental and alternative methods for making local improvements. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Section 170.07, Florida Statutes, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other

interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be assessed. Section 170.07, Florida Statutes also provides that ten (10) days notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

75. Under color of state law, the County Entities never provided Mr. Zipperer who held a mortgage and security interest in the Mortgaged Property, which was part of the property affected by the ordinance and Resolutions, with actual written notice that the County Entities intended to impose a special assessment upon the Mortgaged Property.

76. The County Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Special District. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat that is recorded after the mortgage. See Section 177.081, Florida Statutes.

77. Mr. Zipperer was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the

Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Special District, to notice of the Special District special assessments and their nature.

78. As a direct and proximate result of the County Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the Special District special assessment lien and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

79. As a direct and proximate result of the County Entities' failure to provide written notice, Mr. Zipperer was required to retain the undersigned attorneys and is required to pay a reasonable fee for their services. Mr. Zipperer is entitled to a reasonable attorneys' fee as part of the cost pursuant to Title 42 U.S.C.A Section 1988.

80. Because the County Entities failed to provide the requisite written notice reasonably calculated to apprise Mr. Zipperer under the circumstances of the pendency of an action which materially affected his security interest in the Mortgaged Property, the lien attached to

the Mortgaged Property through Parcels 86061 8602, and 8601 for Special District should be subordinated as junior liens to the purchase money mortgage and foreclosed.

81. The County Entities acting under color of state law denied Mr. Zipperer his right to due process as provided by the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a liens [sic], foreclosure of the Special District special assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, attorneys' fees, the costs of this action, and such other relief just, necessary, and proper.

COUNT V

Cause of Action Against City Entities:
Illegal Taking of Mr. Zipperer's Property

Mr. Zipperer realleges and incorporates herein by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

82. The assessments made on the Mortgaged Property pursuant to the Resolutions entered by the City Entities constitute an illegal taking of Mr. Zipperer Is [sic] property.

83. The Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section VI of the Florida Constitution provide that no state shall deprive a person of property without just compensation.

84. Mr. Zipperer has a legally protected property interest and is entitled to compensation for a regulatory taking of his interest in the Mortgaged Property.

85. The Resolutions which the City Entities passed which levied special assessments on the Mortgaged Property denied Mr. Zipperer of all economically beneficial or productive use of the Mortgaged Property and preclude alienability of the Mortgaged Property. Furthermore, those Resolutions interfered with Mr. Zipperer's distinct, reasonable investment backed expectations for his interest in the Mortgaged Property.

86. As a direct and proximate result of the City Entities' regulatory taking of Mr. Zipperer's security interest in the Mortgaged Property, Mr. Zipperer lost a significant property interest and suffered an illegal impairment and taking of his contract rights because his first purchase money mortgage was purportedly subordinated by operation of law to a junior lien, behind the District 10, 15 and 17 special assessment liens.

87. The City Entities' regulatory taking deprived Mr. Zipperer of all economically beneficial and productive use of the Mortgaged Property and interfered with Mr. Zipperer's distinct reasonable investment backed expectations for the Mortgaged Property without just compensation.

WHEREFORE, Mr. Zipperer requests declaratory relief, prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the cost of this action and

other relief as the Court deems just, necessary and proper.

COUNT VI

Cause of Action Against the County Entities: Illegal Taking of Mr. Zipperer's Property

Mr. Zipperer realleges and incorporates herein by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

88. The assessments made on the Mortgaged Property pursuant to the Ordinance and Resolutions entered by the County Entities constitute an illegal taking of Mr. Zipperer's property.

89. The Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section V, of the Florida Constitution provide that no state shall deprive a person of property without just compensation.

90. Mr. Zipperer has a legally protected property interest and is entitled to compensation for a regulatory taking of his interest in the Mortgaged Property.

91. The Ordinance and Resolutions which the County Entities passed which levied a special assessment on the Mortgaged Property denied Mr. Zipperer of all economically beneficial or productive use of the Mortgaged Property and preclude alienability of the Mortgaged Property. Furthermore, those Resolutions interfered with Mr. Zipperer's distinct, reasonable investment backed expectations for his interest in the Mortgaged Property.

92. As a direct and proximate result of the County Entities' regulatory taking of Mr. Zipperer's security interest in the Mortgaged Property, Mr. Zipperer lost a significant property interest and suffered an illegal impairment and taking of his contract rights because his first purchase money mortgage was purportedly subordinated by operation of law to a junior lien, behind the Special District special assessment lien.

93. The County Entities' regulatory taking deprived Mr. Zipperer of all economically beneficial and productive use of the Mortgaged Property and interfered with Mr. Zipperer's distinct reasonable investment backed expectations for the Mortgaged Property, without just compensation.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the Special District special assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, the cost of this action and other relief as the Court deems just, necessary and proper.

COUNT VII

Cause of Action Against City Entities: Breach of Common Law Duty

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

94. The City Entities had a common law duty to provide Mr. Zipperer, a Mortgagee with a legally protected property interest, with notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value his security interest in the Mortgaged Property.

95. The City Entities breached that duty by failing to conduct a title search of the District 10, 15 and 17 properties which would have revealed that Mr. Zipperer had a mortgage and security interest in the Mortgaged Property, part of those Districts, and by failing to give Mr. Zipperer the requisite notice of the pending special assessments which would affect his security interest in the Mortgaged Property.

96. As a direct and proximate result of the City Entities' failure to conduct the title search and failure to provide Mr. Zipperer with the required notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subordinated by operation of law to the status of a junior lien, behind the District 10, 15, and 17 special assessment liens, without his prior knowledge.

WHEREFORE, Mr. Zipperer requests declaratory relief, prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary, and proper.

COUNT VIII

Cause of Action Against County Entities: Breach of Common Law Duty

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

97. The County Entities had a common law duty to provide Mr. Zipperer, a Mortgagee with a legally protected property interest, with notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value his security interest in the Mortgaged Property.

98. The County Entities breached that duty by failing to conduct a title search of the Special District properties which would have revealed that Mr. Zipperer had a mortgage and security interest in the Mortgaged Property, part of the Special District, and failing to give Mr. Zipperer the requisite notice of the pending special assessments which would affect his security interest in the Mortgaged Property.

99. As a direct and proximate result of the County Entities' failure to conduct the title search and failure to provide Mr. Zipperer with the required notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the Special District special assessment lien, without his prior knowledge.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the Special

District assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary and proper.

COUNT IX

Cause of Action Against City Entities: Illegal Use of Funds

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

100. On information and belief, the City Entities reimbursed DeSimone for expenses incurred in obtaining a Development of Regional Impact ("DRI") Development order, Resolution Nos. 88-28 and 90-46.

101. DeSimone requested that the City Entities establish special assessment districts to provide a means for financing public improvements on the property known as Omni Interstate Park, which includes the Mortgaged Property.

102. The special assessment districts were implemented through the Resolutions for Districts 10, 15, and 17.

103. The City Entities agreed to reimburse and did reimburse DeSimone for the costs related to the public improvements including obtaining the DRI Development Order.

104. It is not necessary to obtain a DRI Development Order to provide the public improvements made pursuant to Districts 10, 15 and 17.

105. The infrastructure and public improvements made to Districts 10, 15 and 17 are not included in any statutory DRI category or threshold but are a necessary and fundamental component of all development projects.

106. Districts 10, 15 and 17 were created pursuant to Chapter 170, Florida Statutes. Special assessments for districts created under Chapter 170 may be levied only for the purposes enumerated in Section 170.01, Florida Statutes. These purposes do not include obtaining a DRI Development Order. Only costs necessary and incident to the improvements in the special assessment district may be reimbursed. Because the DRI Development Order is not necessary or incident to the improvements, it is not a reimbursable cost. The City Entities' reimbursement of DeSimone for these costs was illegal.

107. Article VII, Section X of the Florida Constitution prohibits the expenditure of public funds for a private purpose. Reimbursing costs which are not necessary or incident to improvements made in a special assessment district, such as DRI costs, are a prohibited expenditure of public funds for a private purpose. The City Entities' reimbursement of DeSimone for these costs was illegal.

108. Special assessments constitute a peculiar form of taxation and are levied under the taxing power of the state which is limited by Article VII, Section I of the Florida Constitution which therefore limits the City Entities' powers of taxation in Districts 10, 15 and 17 to only

those permissible taxes. The City Entities' taxing through Districts 10, 15 and 17 for the DRI costs were not within their permissible taxing powers and was illegal.

109. Because the City Entities reimbursed DeSimone for DRI expenses which are not necessary and incident to the District 10, 15 and 17 improvements, expended public funds for a private purpose and taxed outside their permissible taxing powers, the City Entities have illegally used special assessment funds which were obtained by assessing the Mortgaged Property and illegally taken Mr. Zipperer's property interest by purportedly subordinating those interests to a lien based on an illegal expenditure of funds.

WHEREFORE, Mr. Zipperer requests compensatory damages, the cost of this action and all other relief the Court deems just, necessary and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to Jacqueline W. Hubbard, Esquire, City Attorney, P.O. Drawer 2217, Ft. Myers, Florida 33902; Theodore L. Tripp, Jr., Esquire, Garvin & Tripp, P.O. Drawer 2040, Ft. Myers, Florida 33902; John S. Turner, Esquire, Lee County Attorney, P.O. Box 398, Ft. Myers, Florida 33902-0398, and Kathleen E. Moore, Assistant Attorney General, The

Capitol – Suite PL-01, Tallahassee, Florida 32399-1050, on this 27th day of October.

/s/ John H. Rains III
John H. Rains, III FBN 280283
Trial Counsel
Joseph N. Tucker FBN 938297
ANNIS, MITCHELL, COCKEY,
EDWARDS & ROEHN, P.A.
Post Office Box 3433
Tampa, Florida 33601
Attorneys for Mr. Zipperer
(813) 229-3321